A

SUBASHINI RAJASINGAM

v.

SARAVANAN THANGATHORAY (NO 2)

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
[CIVIL APPEAL NO: W-02-1041-2006]

C

2 APRIL 2007

CIVIL PROCEDURE: *Injunction - Erinford injunction - Application for - Jurisdiction and power of Court of Appeal to issue Erinford injunction - Status quo of parties - Leave to appeal - Exercise of*

D

discretion - Balance of justice - Courts of Judicature Act 1964, ss. 44, 80, 96(a) - Civil Law Act 1956, s. 3

CIVIL PROCEDURE: *Jurisdiction - Court - Jurisdiction and power of Court of Appeal to issue Erinford injunction - Courts of Judicature Act 1964, ss. 44, 80, 96(a) - Civil Law Act 1956, s. 3*

E

CIVIL LAW ACT: *English law - Applicability of English common law in Malaysia - Equitable principles - Propriety of Court of Appeal in issuing Erinford injunction - Civil Law Act 1956, s. 3 - Courts of Judicature Act 1964, ss. 44, 80, 96(a)*

F

CIVIL PROCEDURE: *Appeal - Leave to appeal - Jurisdiction of appellate court - Whether no appeal as of right from Court of Appeal - Whether only Federal Court has right to grant such leave - Courts of Judicature Act 1964, ss. 44, 80, 96(a) - Civil Law Act 1956, s. 3*

G

This was a motion by the appellant wife for an Erinford injunction restraining the respondent husband from moving the Syariah Court for relief against the appellant pending her application for leave to the Federal Court. Of particular concern to the appellant was the

H

prospect of the respondent obtaining permanent custody of the eldest child of the marriage and in converting the second child to Islam. There were a number of objections to the appellant's application, which were crystallised into the following three grounds: (i) this court lacked jurisdiction to grant the interim

I

preservation orders sought because it is the Federal Court that ought to be approached under s. 80 of the Courts of Judicature Act 1964 ('Act') which is *ipsissima verba* s. 44 of the Act. It was the respondent's case that as the appeal was at an end, s. 44 of

the Act could not bite and the motion must fail; (ii) the propriety of this court in issuing an Erinford injunction. It was submitted by the respondent that as the case of *Erinford Properties Ltd v. Cheshire County Council* – the case from which the remedy takes its name – was decided in 1974, it ought not to be applied by Malaysian courts by reason of s. 3 of the Civil Law Act 1956 ('1956 Act') which directs Malaysian courts to apply the common law of England in force at the date of its coming into effect, that is 7 April 1956, only in so far as the circumstances permit and save where no provision has been made by statute; and (iii) there had been no change in circumstances since the holding over injunction was dissolved by this court on the respondent's appeal and, as such, a grant of an order in terms of that sought by the appellant would amount to a review by this court of its own decision.

Held (allowing the appellant wife's motion)
Per Gopal Sri Ram JCA delivering the majority judgment of the court:

(1) The issue concerning the jurisdictional point had been conclusively determined against the respondent by the majority decision of this court in *Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No. 2)*, where Abu Mansor JCA (later FCJ) considered it "trite law that a court which has given judgment certainly has the power to order stay". By reason of the decision of the former Court of Appeal in *Hendry v. De Cruz,* the views expressed by the majority in *Chong Wooi Leong (supra)* were binding on this court. Accordingly, this court had ample jurisdiction to deal with the motion. (para 2)

(2) In the absence of a statutory provision prohibiting the application of developments in English law after 7 April 1956, a Malaysian court is entitled to apply cases decided in England after that date. Furthermore, in reference to the case of *Wilson v. Church*, if in 1879 equitable jurisprudence recognised jurisdiction to grant an injunction pending appeal, then, even accepting the submission of the respondent, this was a principle established before 1956 and was in existence at the cut-off date. Hence, the Malaysian courts may safely exercise the power under discussion without even referring to *Erinford Properties (supra)* and, by so doing, be compliant with the direction contained in s. 3 of the 1956 Act. Since there is no statutory prohibition against the issuing of an injunction

A pending appeal, this court had both the jurisdiction and power to issue such an injunction preserving the *status quo* until the outcome of the appellant's leave application. (paras 5 & 6)

(3) The injunction that was dissolved by this court was one that B held the parties to the *status quo* pending an appeal to this court. The order now being sought was one that sought to preserve what Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* termed as "the dynamic *status quo*" pending the appellant's application for leave to the Federal C Court. The issue before this court in the respondent's appeal was whether, having regard to the interpretation given to the several pertinent statutory provisions already discussed in the earlier judgments, the holding over injunction ought to remain. That question was naturally answered in the negative by the D majority judgments because the appellant's appeal failed. However, the question before this court on the present motion was quite different, it being whether the *status quo* presently prevailing should remain undisturbed until the correctness of this court's decision had been tested at the E next level. So it was quite wrong to treat the motion for the present interim preservation orders as an application to review this court's earlier ruling. It was not. (para 7)

(4) As to the exercise of discretion, the facts of the case show a F respondent who ignored the rights of the child's mother and moved the Syariah Court in defiance of the clear words of s. 46 of the Administration of Islamic Law (Federal Territories) Act 1993, which only enables that court to adjudicate upon disputes in which all parties are Muslims. He had, therefore, G shown himself as having a propensity to act unlawfully, and he had also disregarded the appellant's entrenched statutory and constitutional rights to have a say in the custody and religion of her minor child. Hence, if interim protection were not afforded to the appellant, there was a real risk that the H respondent may proceed to take further steps, such as obtaining a final custody order, thereby adversely affecting the integrity of her application for leave before the Federal Court. Last, but not least, the appellant's proposed application for leave was not arguable. Quite apart from issues of I constitutional law being at stake, there was also the fact that there was disagreement in this court as to the way in which the law ought to be interpreted, including the doubt that lingered as to the correctness of some earlier decisions on the

way in which List II of the Federal Constitution should be approached in relation to the jurisdictional point. Given these facts, and having regard to all the circumstances of the case, the balance of justice lay in favour of granting the orders sought by the appellant. (para 8)

Per Suriyadi Halim Omar JCA (dissenting):

(1) Both parties had admitted that there had been no attempts by anyone, with or without the help of the Syariah Court, to convert the younger child to the religion of Islam. The respondent had already commenced legal proceedings before the Syariah Court, and it was not within the jurisdiction of the Civil Court to instruct and order the Syariah Court on how to conduct its daily business. Thus, within the scope of the 1st and 2nd prayer of the appellant, there was nothing to be rendered nugatory. From a statutory requirement point of view, it was also crystal clear that no leave had yet been obtained from the Federal Court to resolve the supposed important points of law at that stage. The appellant's affidavit was informative when it affirmed that the issues to be brought before the Federal Court were yet to be precisely formulated. Only the Federal Court has the right to grant such leave to appeal; there is no appeal as of right from the Court of Appeal. At the time when the decision of the motion was delivered, no leave application had been filed let alone an appeal pending. Shorn of all the frills, reading the requirements of s. 96(a) of the Act and requirements of the Erinford application, the motion was flawed. With no appeal pending, and no likelihood of a successful appeal being rendered nugatory, even if there were one, the appellant's motion for an Erinford injunction must be dismissed. (paras 28, 29, 32 & 34)

Bahasa Malaysia *Translation of Headnotes*

Ini adalah usul perayu isteri bagi mendapat injunksi Erinford bagi menghalang responden suami dari mendapatkan relif terhadap perayu di Mahkamah Syariah sementara menunggu keputusan permohonan perayu untuk kebenaran di Mahkamah Persekutuan. Yang membimbangkan perayu adalah kemungkinan responden memperoleh perintah jagaan kekal anak sulung mereka serta mengislamkan anak kedua mereka. Terdapat beberapa bantahan terhadap permohonan perayu, yang menjurus kepada tiga alasan, iaitu: (i) mahkamah ini tidak mempunyai bidangkuasa untuk

memberi perintah pengekalan interim yang dipohon oleh kerana menurut s. 80 Akta Mahkamah Kehakiman 1964 ('Akta), yang merupakan *ipsissima verba* s. 44 Akta, permohonan harus dibuat ke Mahkamah Persekutuan. Kes responden adalah, oleh kerana rayuan berada di tahap terakhir, maka s. 44 Akta tidak terpakai dan usul seharusnya gagal; (ii) kewajaran mahkamah ini mengeluarkan injunksi Erinford. Hujah responden adalah, oleh kerana kes *Erinford Properties Ltd v. Cheshire County Council* – kes yang memberikan nama kepada remedi – diputuskan pada tahun 1974, ia tidak seharusnya dipakai oleh mahkamah-mahkamah Malaysia disebabkan oleh s. 3 Akta Undang-Undang Sivil 1956 ('Akta 1956'), yang mewajibkan mahkamah-mahkamah Malaysia untuk memakai undang-undang common England yang terpakai pada tarikh ia dikuatkuasa, iaitu 7 April 1956, hanya setakat mana ianya sesuai dengan keadaan dan di mana tiada peruntukan mengenainya dibuat oleh statut; dan (iii) tidak terdapat apa-apa perubahan pada halkeadaan sejak mahkamah melupuskan injunksi pegangan lepas masa (holding over injunction) ekoran rayuan responden, yang bermakna, memberi perintah seperti dipohon kepada perayu menyebabkan mahkamah ini menyemak semula keputusannya sendiri.

Diputuskan (membenarkan usul perayu isteri)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman majoriti mahkamah:

(1) Isu mengenai soal bidangkuasa telah dengan muktamadnya diputuskan secara yang tidak memihak kepada responden oleh keputusan majoriti mahkamah ini di dalam *Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No. 2)*, di mana Abu Mansor HMR (kemudiannya HMP) menganggapnya sebagai "undang-undang mantap bahawa sesebuah mahkamah yang memberikan penghakiman semestinya mempunyai kuasa untuk memerintahkan penggantungan". Berdasarkan keputusan Mahkamah Rayuan dahulu di dalam *Hendry v. De Cruz*, pandangan yang diutarakan oleh keputusan majoriti di dalam *Chong Wooi Leong (supra)* mengikat mahkamah ini. Ianya mengikut bahawa mahkamah ini mempunyai bidangkuasa kukuh untuk menangani usul di sini.

(2) Dalam ketiadaan peruntukan statut yang menghalang penggunaan apa yang berkembang dari undang-undang Inggeris selepas 7 April 1956, sebuah mahkamah Malaysia boleh menggunapakai kes-kes yang diputuskan di England selepas

tarikh tersebut. Selain itu, dengan merujuk kepada kes *Wilson v. Church*, jika pada tahun 1879 jurispruden berekuiti telah mengiktiraf bidangkuasa untuk memberi injunksi sementara menunggu rayuan, maka, jikapun diterima hujah responden, ia merupakan prinsip yang dibentuk sebelum tahun 1956 dan masih wujud pada tarikh penentuan. Oleh itu, mahkamah-mahkamah Malaysia boleh melaksanakan kuasanya yang berkenaan tersebut tanpa perlu merujuk kepada *Erinford Properties (supra)* dan, dalam berbuat demikian, masih tetap mematuhi kehendak s. 3 Akta 1956. Oleh kerana tiada halangan untuk mengeluarkan injunksi sementara menunggu rayuan, mahkamah ini mempunyai kuasa dan juga bidangkuasa untuk mengeluarkan injunksi mengekalkan *status quo* sehingga permohonan kebenaran perayu diputuskan.

(3) Injunksi yang dilupuskan oleh mahkamah ini adalah injunksi yang mengikat pihak-pihak kepada *status quo* sementara menunggu rayuan ke mahkamah ini. Perintah yang dipohon sekarang adalah perintah bagi mengekalkan apa yang dikatakan oleh Lord Diplock di dalam *Garden Cottage Foods Ltd v. Milk Marketing Board* sebagai "*status quo* dinamik" sementara menunggu permohonan kebenaran perayu di Mahkamah Persekutuan. Dalam rayuan responden, isu di hadapan mahkamah ini adalah sama ada injunksi 'holding over' tersebut patut kekal, mengambilkira tafsiran yang diberikan kepada beberapa peruntukan statut seperti yang dibincang dalam keputusan-keputusan terdahulu. Persoalan tersebut memanglah dijawab secara negatif oleh keputusan majoriti kerana rayuan perayu menemui kegagalan. Bagaimanapun, persoalan di hadapan mahkamah ini atas usul di sini agak berlainan, iaitu sama ada *status quo* yang wujud kini harus dikekalkan sehingga soal betul atau tidaknya keputusan mahkamah ini ditentukan diperingkat yang lebih atas. Oleh yang demikian, adalah silap untuk menganggap usul untuk mendapat perintah pengekalan interim di sini sebagai permohonan untuk menyemak keputusan terdahulu mahkamah ini. Ia tidak begitu.

(4) Mengenai pelaksanaan budibicara, fakta kes menunjukkan seorang responden yang tidak mengendahkan hak ibu kepada kanak-kanak dan yang menggerakkan Mahkamah Syariah secara yang melanggar peruntukan s. 46 Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993, yang hanya membenarkan mahkamah tersebut mengadili pertikaian di mana semua pihak yang terlibat adalah beragama

A Islam. Responden dengan itu telah menunjukkan kecenderungan untuk bertindak secara tak sah, serta secara yang tidak mempedulikan hak perayu di sisi statut dan perlembagaan atas soal penjagaan dan ugama anak kecil itu. Oleh itu, jika perlindungan interim tidak diberi kepada perayu, maka terdapat
B risiko sebenar bahawa responden akan mengambil langkah selanjutnya, seperti mendapatkan perintah penjagaan muktamad, sekaligus memudaratkan permohonan kebenaran perayu di Mahkamah Persekutuan. Terakhir tapi tidak kurang pentingnya, permohonan kebenaran perayu yang dicadangkan
C itu tidak boleh dipersoalkan. Selain dari pertikaian mengenai isu undang-undang perlembagaan, fakta juga menunjukkan bahawa wujud perselisihan di mahkamah ini mengenai cara untuk mentafsirkan undang-undang, dan ini termasuk keraguan yang berpanjangan mengenai betul atau tidaknya beberapa
D keputusan terdahulu berkaitan pendekatan yang harus diambil terhadap Senarai II Perlembagaan Persekutuan dalam hubungannya dengan persoalan bidangkuasa. Berdasarkan fakta-fakta ini, serta mengambilkira halkeadan kes, imbangan keadilan adalah berpihak kepada pemberian perintah-perintah
E yang dipohon perayu.

Oleh Suriyadi Halim Omar HMR (menentang):

(1) Kedua-dua pihak mengakui bahawa tidak wujud sebarang
F percubaan oleh mana-mana pihak, sama ada dengan pertolongan Mahkamah Syariah ataupun tidak, untuk mengislamkan anak kedua mereka tersebut. Responden telah pun memulakan prosiding di Mahkamah Syariah, dan bukanlah termasuk dalam bidangkuasa Mahkamah Sivil untuk mengarahkan
G Mahkamah Syariah bagaimana mereka harus mengendalikan halehwal harian mereka. Oleh itu, mengambilkira skop permohonan pertama dan kedua responden, tiada apapun yang akan menjadi sia-sia. Dari sudut persoalan statutori, adalah jelas bahawa kebenaran masih belum diperolehi dari Mahkamah
H Persekutuan untuk menyelesaikan persoalan undang-undang penting yang dikatakan berbangkit di peringkat itu. Afidavit perayu adalah informatif bilamana menyatakan bahawa isu-isu yang akan dibawa ke hadapan Mahkamah Persekutuan belum lagi dimuktamadkan. Hanya Mahkamah Persekutuan berhak
I memberikan kebenaran merayu tersebut; rayuan dari Mahkamah Rayuan tidak wujud sebagai suatu hak. Semasa keputusan terhadap usul dibuat, tiada permohonan untuk kebenaran telah difail, sementelah suatu rayuan yang menunggu keputusan.

Dengan mengenepikan soal remeh temeh, usul adalah cacat berdasarkan kehendak s. 96(a) Akta serta syarat-syarat permohonan Erinford. Dengan tiadanya rayuan yang masih menunggu keputusan, dan tiadanya kemungkinan satu rayuan yang berjaya akan menjadi sia-sia, usul perayu untuk injunksi Erinford seharusnya ditolak.

Case(s) referred to:

Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 FC ***(refd)***

Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No 2) [1998] 3 CLJ 685 CA ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***

Erinford Properties Ltd v. Cheshire County Council [1974] 2 All ER 448 ***(refd)***

Erinford Properties Ltd v. Cheshire County Council [1974] Ch 261 ***(refd)***

Garden Cottage Foods Ltd v. Milk Marketing Board [1984] AC 130 ***(refd)***

Haines v. Taylor [1847] 41 ER 922 ***(refd)***

Hendry v. De Cruz [1949] MLJ Supp 25 ***(refd)***

Jamil Harun v. Yang Kamsiah & Anor [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11 PC ***(refd)***

Lam Kong Company Ltd v. Thong Guan Co Pte Ltd [2000] 3 CLJ 769 FC ***(refd)***

Lori (M) Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***

Wilson v. Church [1879] 11 Ch D 576 ***(refd)***

Legislation referred to:

Administration of Islamic Law (Federal Territories) Act 1993, s. 46

Civil Law Act 1956, s. 3

Courts of Judicature Act 1964, ss. 44, 80, 96(a), 97

For the appellant - Malik Imtiaz Sarwar (Haris Mohd Ibrahim, K Shanmuga & Richard Wee Thiam Seng with him); M/s Kanesalingam & Co

For the respondent - Mohamed Haniff Khatri Abdulla (Zainul Rijal Abu Bakar with him); M/s Zainul Rijal Talha & Amir

Watching brief - Meera Samanther; Women's Aid Organisation (WAO), All Women's Action Society (AWAM), Women's Development Collective (WDC), Women's Center for Change (WCC) & Sisters in Islam (SIS), Bar Council

Ng Chek; Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism

[Appeal from High Court, Kuala Lumpur; Divorce Petition No: S8-33-994-2006]

Reported by Suresh Nathan

A

JUDGMENT

Gopal Sri Ram JCA:

[1] On Friday, 30 March this court was moved for an order to restrain the respondent husband from moving the Syariah Court B for relief against his non-Muslim wife pending the latter's application for leave to the Federal Court. Of particular concern to the appellant wife is the prospect of the respondent obtaining permanent custody of the eldest child of the marriage and in converting the second child to Islam. The background and the C issues central to the dispute between the parties to this litigation have been set out in the separate judgements of this court that were delivered on 13 March 2007.

[2] A number of objections to the wife's application were raised D all of which crystallise into three grounds which require to be addressed. First, (and here I summarise the lengthy submissions by counsel for the respondent without doing him any injustice) it was said that we lack jurisdiction to grant the interim preservation orders sought because it is the Federal Court that ought to be E approached under s. 80 of the Courts of Judicature Act 1964 which is *ipsissima verba* s. 44 of that Act. Both sections refer to a power to make "any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding". It is the husband's case that as the appeal before us is at an end, s. 44 F cannot bite and the motion must fail. I do not propose to deal with the convoluted arguments advanced in support of the jurisdictional point because the issue has been conclusively determined against the husband by the majority decision of this court in *Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No 2)* [1998] G 3 CLJ 685 where Abu Mansor JCA (later FCJ) considered it "trite law that a court which has given judgment certainly has the power to order stay." By reason of the decision of the former Court of Appeal in *Hendry v. De Cruz* [1949] MLJ Supp 25, the views expressed by the majority in Chong Wooi Leong are binding on H us. Accordingly, we have ample jurisdiction to deal with the motion.

[3] The second ground advanced by the husband has to do with the propriety of this court applying what has come by the I legal professions throughout the Commonwealth as an "Erinford injunction". That remedy takes its name from the case of *Erinford Properties Ltd v. Cheshire County Council* [1974 Ch 261 where it was held that a court of first instance which refuses an injunction

could nevertheless grant an injunction preserving the *status quo* pending an appeal against the refusal. It was submitted by learned counsel that as that case was decided in 1974 (the actual decision was handed down on 18 March 1974), it ought not to be applied by our courts by reason of s. 3 of the Civil Law Act 1956 which directs our courts to apply the common law of England in force at the date of its coming into effect, that is 7 April 1956, only in so far as the circumstances permit and save where no provision has been made by statute law. With respect, I cannot agree.

[4] The effect of s. 3, often misunderstood by many, was stated by Hashim Yeop A Sani (CJ(M)) in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 to be that:

> The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country.

It is important to note that this view was endorsed by the Federal Court in *Lori (M) Bhd (Interim Receiver) v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997.

[5] Another way is to treat s. 3 as not forbidding a Malaysian Court from applying modern developments in English common law. In *Jamil bin Harun v. Yang Kamsiah & Anor* [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11 it was argued that s. 3 prevents the application by Malaysian courts of English cases decided after 7 April 1956 and as such the practice of Malaysian courts of itemising damages for the purpose of calculating interest on damages by following English cases decided after 7 April 1956 was unlawful. That argument was rejected by the Privy Council whose judgment was delivered by Lord Scarman in the following terms:

> Clearly the English statute requires, or at the very least strongly encourages, itemisation of damages in personal injury cases, so that interest appropriate to each head of damage may be ordered: section 3(1A) and (1B) of the 1934 Act. Though no such requirement exists in Malaysia, the **written law certainly does not forbid** or prevent differentiation in the period or rate of interest as appropriate between the different heads of loss or damage suffered by a plaintiff. **Nor does the written law forbid** the Courts to adopt the itemisation process in assessing damages. **The courts of Malaysia are free to take their own course.** The Federal Court was not, therefore, prevented by the written law of

A Malaysia from using the itemisation process in the assessment of damages for personal injury. Their Lordships reject the submission that in so doing the Federal Court was guilty of any error of law. (emphasis added.)

B Put shortly, absent a statutory provision prohibiting the application of developments in English law after 7 April 1956, a Malaysian court is entitled to apply cases decided in England after that date. Indeed, this is what the Federal Court did in *Lori (M) Bhd (Interim Receiver) v. Arab-Malaysian Finance Bhd.*

C **[6]** There is another and perhaps stronger reason that defeats the husband's argument. You begin with the proposition that a Court of Equity has jurisdiction to grant interim injunctive relief whenever it is just and convenient to do so. That is to say, an injunction may be granted to serve the ends of justice. Whether D the ends of justice will be served in a given case depends on the facts and circumstances of that case. In the normal case, where an interim injunction is refused or dissolved, the ends of justice may, in particular cases, demand that the successful litigant be restrained from enjoying the fruits of his success until the E correctness of the decision in question has been tested through the appellate process. Erinford Properties is merely an illustration of the exercise of that jurisdiction by a court of first instance. But there is a case in which the English Court of Appeal exercised that jurisdiction. It is *Wilson v. Church* [1879] 11 Ch. D 576. F There, an action against trustees for moneys held by them was dismissed. The plaintiffs appealed and, without applying to the judge at first instance, moved the Court of Appeal for an injunction restraining the defendants from parting with the trust funds pending the appeal. The Court of Appeal held that it had G jurisdiction and granted the injunction. Jessel M.R. (with whom Brett and Cotton LJJ concurred) observed that the "application for an injunction was properly made to the Court of Appeal." If in 1879 equitable jurisprudence recognised jurisdiction to grant an injunction pending appeal, then, even accepting the submission of H counsel for the respondent husband, this was a principle established before 1956 and was in existence at the cut-off date. Hence, our courts may safely exercise the power under discussion without even referring to *Erinford Properties.* And by so doing we will be compliant with the direction contained in s. 3 of the Act I of 1956. We do not have to call it an "Erinford injunction" but do so for convenience. Labels mean nothing. It is the scope and extent of the particular injunction and the power to grant it that

really matters. And, as may be seen, for the existence of the power there is ample authority even before 1956. See, also *Haines v. Taylor* [1847] 41 ER 922. Since there is no statutory prohibition against the issuing of an injunction pending appeal, we may safely assert that we do have both jurisdiction and power to issue such an injunction preserving the *status quo* until the outcome of the wife's leave application.

[7] The husband's third ground of objection is this. There has been no change in circumstances since the holding over injunction was dissolved by this court on the husband's appeal. As such a grant of an order in terms of that sought by the wife will amount to a review by this court of its own decision. This is an argument that is devoid of any merit. The injunction that was dissolved by my learned brothers in their judgments was one that held the parties to the *status quo* pending an appeal to this court. The order now being sought is one that seeks to preserve what Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130 termed as "the dynamic *status quo*" pending the wife's application for leave to the Federal Court. The issue before this court in the husband's appeal was whether, having regard to the interpretation given to the several pertinent statutory provisions already discussed in the earlier judgments, the holding over injunction ought to remain. That question was naturally answered in the negative by the majority judgments because the wife's appeal failed. But the question before us on the present motion is quite different. It is whether the *status quo* presently prevailing should remain undisturbed until the correctness of this court's decision has been tested at the next level. So it is quite wrong to treat – as counsel for the husband has done – the motion for the present interim preservation orders as an application to review our earlier ruling. It is not. As Megarry J (later Vice Chancellor) said in *Erinford Properties*:

> I turn to the other way that Mr. Finlay put his case, that of inconsistency: and as I indicated to him during the argument, that, rather than jurisdiction, seemed to me to be his real case. Having held that it would be wrong to grant the plaintiffs an injunction, how can a judge, consistently with his judgment, hold that it is right to grant them a similar though more limited injunction? Mr. Finlay did not challenge the decision in *Orion* [1962] 1 WLR 1085, but he distinguished it: the complicated facts of that case, I may say, are more fully set out in [1962] 3 All ER 466. In that case, said Mr. Finlay, the decision by the trial judge had been as to the ownership of certain shares, and the injunction granted

pending appeal was merely to restrain the successful defendants from acting on their success pending the appeal. That was not a case in which an injunction had been sought in the action and refused, and the judge had then granted an injunction pending an appeal. Furthermore, in that case subsequent events had occurred (the defendant company had issued some new shares), whereas here there was no new event: the intimation of a probable intention to appeal was not such an event. I do not think that these contentions are sound. Mr. Finlay disclaimed any contention that injunctions stood in a category by themselves, and said that if, for example, the plaintiff failed in a claim to have a receiver appointed, the judge could not appoint a receiver pending an appeal, and only the Court of Appeal could. The argument seemed in the end to come to the alleged inconsistency between granting, pending appeal, the selfsame relief that has been refused at the trial or on motion. On this argument, such a case should, it seems, be treated quite differently from the case of an inconsistency between a declaration or decision that A owns certain property and an injunction fettering A's rights of ownership pending appeal, as by enjoining him from making any distribution of the property pending the appeal; the latter form of inconsistency is no bar to the judge granting the injunction.

I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial, the question is whether the plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the *status quo* pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an

injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes *functus officio* quoad granting any injunction at all.

In my judgment the foregoing observations apply *mutatis mutandis* with equal force to the present instance.

[8] I now turn to the exercise of discretion. Now look at the facts of this case. Here you have a husband who ignores the rights of the child's mother and moves the Syariah Court in defiance of the clear words of s. 46 of the Administration of Islamic Law (Federal Territories) Act 1993 which only enables that court to adjudicate upon disputes in which all parties are Muslims. He has therefore shown himself as having a propensity to act unlawfully. Next, as learned counsel for the wife has submitted – which submission has merit – his client's entrenched statutory and constitutional rights to have a say in the custody and religion of her minor child have been disregarded by the husband. Hence, if interim protection is not afforded to the wife there is a real risk that the husband may proceed to take further steps, such as obtaining a final custody order, thereby adversely affecting the integrity of her application for leave before the Federal Court. Last, but not the least, the wife's proposed application for leave is not unarguable. Quite apart from issues of constitutional law being at stake, there is also the fact that there was disagreement in this court as to the way in which the law ought to be interpreted, including the doubt that lingers as to the correctness of some earlier decisions on the way in which List II of the Federal Constitution should be approached in relation to the jurisdictional point. Given these facts, and having regard to all the circumstances of the case, it is my judgment that the balance of justice lies in favour of granting the orders sought by the appellant wife.

[9] For the reasons already given, I granted the wife the orders she sought. My learned brothers and I were unanimous that the costs of the motion should follow the event of the wife's application for leave.

[10] My learned brother Hasan bin Lah, JCA has seen this judgment in draft and has expressed his agreement with it.

A **Suriyadi Halim Omar JCA:**

[11] To appreciate the case fully it is necessary that I reiterate some of the salient facts of this case. The applicant and the respondent were practicing Hindus and had a civil marriage, B subsequently to be blessed with 2 children. The elder child was Dharvin Joshua and the younger being Sharvind. The applicant later petitioned for a divorce at the civil court as the marriage could not be salvaged.

C **[12]** She later came to know that the respondent, together with the elder son had converted to the religion of Islam. On receipt of that information she had filed an *ex parte* summons in chambers at the High Court on 4 August 2006, praying for an interlocutory injunction preventing the respondent from converting the children, and preventing him from continuing with any form of proceedings D at the Syariah Court pertaining to the marriage or pertaining to the children of the marriage.

[13] The respondent, who admitted to having been converted to the religion of Islam, in defence had admitted that he already had E initiated a few proceedings at the Wilayah Persekutuan Syariah Court, eg, a pending marriage dissolution proceedings, a successful *ex parte* interim custody application culminating in an interim custody order of Dharvin Joshua, and a permanent custody order application for Dharvin Joshua, even before the *ex parte* F interlocutory injunction application of the applicant was filed. In brief his applications at the Syariah Court had preceded the applicant's interlocutory injunction application.

[14] The respondent had also submitted that the civil High Court G had no jurisdiction to issue any injunction to bar the jurisdiction of the Syariah Court.

[15] After dismissing the relevant application the learned judge saw it fit to grant an Erinford injunction. An Erinford injunction is an injunction granted pending the appeal against the dismissal of H that application for an injunction. An appeal was filed by the applicant pursuant to the dismissal of that interlocutory injunction application with the respondent filing a cross-appeal as against the granting of the Erinford injunction.

I **[16]** When the matter came up before the panel, I had approached the appeal in a rather clinical fashion, and had stated that this discretionary relief must be exercised in accordance with

established principles. I had stated that to succeed she must establish that there was a serious question to be tried before the court. At the end of the day I had found that she had failed to establish that legal requirement as the substratum of her case was not proved. I had also found as a fact that the injunction was not directed at the applicant but the Syariah Court.

[17] I had found, based on the evidence, that Dharvin Joshua had already been converted to Islam, with the scope of the fear of conversion now only focused on the younger child ie, Sharvind, a child which held no interest in him.

[18] On the same date of the hearing of the appeal ie, 13 March 2007, by a majority decision of 2 to 1, the applicant's appeal was dismissed with costs whilst the cross-appeal as against the Erinford injunction order was allowed. The Erinford injunction accordingly thus was set aside.

The Erinford Motion

[19] Pursuant to the abovementioned orders the applicant had promptly filed a fresh Erinford application by way of motion. The following orders sought were:

> 1. an Erinford injunction until the hearing and disposal of the said application for leave to appeal to the Federal Court that the respondent Saravanan A/Lthangathoray [NO. KP750930-14-5795] by himself or through his solicitors, peguam syarie, agents or otherwise howsoever be restrained and prohibited from
>
> a) converting to Islam the child of the marriage Sharvind (birth certificate No. 050616-14-1123), and
>
> b) commencing or continuing with any form of proceedings in any Syariah Court in respect of the marriage between the petitioner and the respondent or in respect of the children of the marriage the children of the marriage Dharvin Toshua (birth certificate No. 030511-14-1049) or Sharvind (birth certificate No. 050616-14-1123) or either of them.

[20] The motion was supported by an affidavit, which had laid bare the history of the dismissed interlocutory injunction application, together with all the relevant supporting documents. Needless to say the contents were a repeat of the background and antecedent of the interlocutory injunction application. In the supporting affidavit the applicant did state that there were issues, though yet to be precisely formulated, which required the

A interference of the Federal Court. An important issue needed to be resolved by the Federal Court, amongst others, as asserted by the applicant was the question "Do the Syariah Courts have jurisdiction under the Federal Constitution in respect of any matter where a party to a dispute is a person who does not
B profess Islam as her religion".

[21] The applicant's submission was quite precise and had ventilated in her skeletal outline as follows:

C
1. The Court must be mindful of the fact that its decision may be varied on appeal.

2. The Court must assess the comparative effects of granting or refusing an injunction pending appeal with a view to preserving the integrity of the appeal.

D
3. Upon such a consideration, the Court should consider whether it would be right to preserve the *status quo* pending appeal.

[22] It was further submitted that:

E
the *status quo* of the parties would be altered if an Erinford is not granted as the respondent has indicated that he will not consent to this stay of proceedings;

if the *status quo* is not preserved, the very mischief sought to be
F prevented would occur before the appeal, or any written application, could be heard and disposed of;

this would render the application for leave to appeal and the subsequent appeal nugatory and deprive the appellant of the fruits of her litigation.

G
[23] On 30 March 2007 when the same panel heard the Erinford motion, I had held the view that for a successful outing the applicant must, before I exercise my discretion, establish the prerequisites of the requirements of an Erinford injunction. I had
H begun the ball rolling by enquiring whether any changes had taken place from 13 March 2007 ie, the date of the appeal's decision. The answer was in the negative. It transpired that Sharvind was with the mother all along. I then had posed the question to the applicant's counsel whether any attempt had been made to
I convert Sharvind, since that relevant date. The answer again was in the negative. It was thus quite clear that *status quo* had been maintained.

[24] Not a single party in the application had touched on the effect of an Erinford injunction on the Syariah court's proceedings, had the Syariah judge wanted to proceed with the applications filed by the respondent. Whether the application would be struck out for want of prosecution, due to the respondent being absent, for fear of contempt proceedings being initiated by the Court of Appeal, or the case postponed to another date, was not canvassed. It was obvious to me though that if that scenario were to take place, an interference of the Syariah Court's proceedings by the civil court would have taken place. Lording over another properly constituted Syariah court and undermining the co-existence of two systems of court as recognized by the Federal Constitution must be avoided at all cost.

[25] A rather pertinent point which had disturbed me was the fact that at the stage of the hearing of that Erinford motion, no appeal was pending before the Federal Court. In fact no leave application had even been filed let alone an appeal pending. To appreciate this point I reproduce the relevant portion of Megarry J's remarks in the case of *Erinford Properties Ltd v. Cheshire CC* [1974] 2 All ER 448 (arguably the source of the Erinford injunction) at 455. Megarry J had opined:

> I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial, the question is whether the plaintiff has sufficiently proved his case. *On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal* (emphasis added).

[26] An Erinford injunction application is as good as a second bite at the cherry after a failed attempt at an interlocutory injunction application. Invariably it is supposed to satisfy the prayers of the failed interlocutory injunction application but within the scope of the prayers of say, in this case, the motion. The rationale, amongst others, is the premise that no judge is infallible, and unless the order was given, a successful appeal might be rendered nugatory. This principle of ensuring that a successful appeal is not rendered nugatory may be traced to the later part of Megarry J's statement in *Erinford Properties Ltd v. Cheshire (supra)*, where he said:

A ... the principle is to be found in the leading judgment of Cotton LJ in *Wilson v. Church (No 2)*1, where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, "when a party is appealing, exercising his undoubted right of appeal, **this Court ought to see that the appeal, if successful, is not nugatory"**. That was the principle ...., and not because I felt any
B real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought (emphasis mine).

[27] No rules ought to be relaxed in an Erinford injunction
C application, bearing in mind that it is a backdoor action, attempting to resuscitate a failed interlocutory application. The interest of the other party must never be discarded on the mere pretext of possible weaknesses of a judge and "that it is right to preserve the *status quo*". As Megarry J said at p. 454 (*Erinford Properties Ltd*
D *(supra)*):

> There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on (emphasis mine).

E

[28] Having perused the facts, even if an appeal had already been filed at the time of the hearing of the motion:

i. It was admitted by counsel of both parties that there had
F been no attempts by anyone, with or without the help of Syariah Court, to convert Sharvind to the religion of Islam. In that context what was there to be rendered nugatory (in relation to the 1st prayer)?

ii. Legal proceedings had already been commenced before the
G Syariah Court by the respondent, and it is not within the jurisdiction of the Civil Court to order the Syariah Court how to conduct its daily business. Within the scope of this 2nd and last prayer there was nothing to be rendered nugatory.

H **[29]** From a statutory requirement point of view it was also crystal clear that no leave had yet been obtained from the Federal Court to resolve the supposed important points of law at that stage. The affidavit of the applicant was informative when it affirmed that the issues to be brought before the Federal Court
I were yet to be precisely formulated. In the course of preparing this judgment I was supplied with the information by the Court

Registry that the application for leave was only filed at about 11.49am on the same day, ie, after the panel had meted down its decision.

[30] Section 96 of the Courts of Judicature Act 1964 (Act 91) reads:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
>
> ....

[31] Section 97 promulgates the time period and it reads:

> (1) An application under section 96 for leave to appeal to the Federal Court shall be made to the Federal Court within one month from the date on which the decision appealed against was given, or within such further time as may be allowed by the Court.

[32] In the course of my research, I was also not unmindful of the useful but dissenting decision of NH Chan JCA in *Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No. 2)* [1998] 3 CLJ 685, which had fortified my view pertaining to this issue of leave. A cursory reading of the above provisions and the above case reveals that only the Federal Court has the right to grant such leave to appeal. That leave stage is analogous to the infant stage in the appeal process with the right to appeal arising only after leave to appeal has been granted. Reading it from the other angle, the above provisions establish that there is no appeal as of right from the Court of Appeal. This precondition of leave to appeal or right of appeal, which are vital ingredients, was also clearly enunciated in *Lam Kong Company Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769 where the Federal Court stated at p. 785:

A It is to be noted that Parliament has thought fit to impose conditions in respect of right of appeal from the Court of Appeal to the Federal Court under s. 96(a) of the Act. The conditions are that leave of the Federal Court must be obtained and the matters that are appealable are from any judgment or order of the
B Court of Appeal in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction. On the true construction of s. 96(a), we form the view that the judgment or order of the Court of Appeal to appeal from must be in respect of a cause or matter decided by the High Court on the merits and not in respect of interlocutory judgment or order decided by
C the Court of Appeal upon the hearing of an application made to it in a pending appeal before it.

[33] In *Auto Dunia Sdn Bhd v. Wong Sai Fatt & 3 Others* [1995] 3 CLJ 485, the Federal Court per Edgar Joseph Jr FCJ had
D opined:

It is an elementary proposition that this Court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no
E appeal lies.

[34] To summarise, at the time when the decision of the motion was delivered, no leave application had been filed let alone an appeal pending. Shorn of all the frills, reading the requirements of
F s. 96(a) of the Courts of Judicature Act 1964 (Act 91) and requirements of the Erinford application, the motion was flawed on 30 March 2007. With no appeal pending, and no likelihood of a successful appeal being rendered nugatory, even if there was one, I thus had no hesitation in dismissing the motion by the applicant
G for an Erinford injunction with costs.

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I